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In The
Supreme Court of the United States

DENNY'S, INCORPORATED, IN ITS FIDUCIARY CAPACITY AS PLAN ADMINISTRATOR; DENNY'S, INCORPORATED VACATION PAY PLAN; ANDREW F. GREEN, IN HIS CAPACITY AS TRUSTEE OF THE DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST; DENNY'S INCORPORATED EMPLOYEE BENEFITS TRUST,

Petitioners,

v.

CHUCK CAKE, IN HIS CAPACITY AS ACTING DIRECTOR OF THE CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS; ARTHUR LUJAN, IN HIS CAPACITY AS THE LABOR COMMISSIONER OF THE STATE OF CALIFORNIA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
NATIONAL CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

HOLLIS T. HURD
Counsel of Record
THE BENEFITS DEPARTMENT
Suite 120
Penn Center West Three
Pittsburgh, PA 15276
(412) 788-2334

Counsel for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

Pursuant to S. Ct. Rule 37.2, the Chamber of Commerce of the United States (the "Chamber") respectfully moves for leave to file a brief *amicus curiae* in support of the petition for certiorari in this case. A copy of the proposed brief is attached. The consent of the attorney for petitioners has been obtained. The consent of the attorney for the respondents was requested but refused. In support of this motion, the Chamber notes the following:

The Chamber is the world's largest business federation representing an underlying membership of nearly three million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of concern to American business.

The Chamber's membership has an interest in this case because nearly all of its members maintain employee benefit plans covered by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). They are vitally interested in preserving the uniform, national regulation of employee benefit plans under ERISA and avoiding the confusion, risk and attendant cost of having to comply with various state laws.

In many instances, the members themselves serve as fiduciaries with respect to their plans, in capacities such as plan administrator or trustee and bear direct liability for breaches of fiduciary responsibility in the administration of those plans. In other instances, they appoint the fiduciaries and bear indirect responsibility either through

a duty to supervise their appointees or by way of indemnification. Regardless of the form, however, the members commonly bear ultimate responsibility for breaches of fiduciary responsibility, such as failure to follow applicable law, so it is critically important that they have available, for their own protection, the right to seek instructions from a federal court under ERISA as to the pre-emption of state law.

While the petition addresses the Anti-Injunction Act in general and establishes the conflict among the circuits, the Chamber submits this brief in order to bring to the Court's attention the critical importance of the decision in the particular area of fiduciary responsibility under ERISA. Accordingly, the Chamber respectfully moves the Court to grant this motion and allow the filing of the attached brief.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

HOLLIS T. HURD
Counsel of Record
THE BENEFITS DEPARTMENT
Suite 120
Penn Center West Three
Pittsburgh, PA 15276
(412) 788-2334

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 1

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 1

ARGUMENT 2

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Blue Cross and Blue Shield of Alabama v. Hobbs, 209 F.R.D. 218 (M.D. Ala. 2002) 9

Children's Hospital v. Whitcomb, 778 F.2d 239 (5th Cir. 1985) 9

De Buono v. NYSA-ILA Medical and Clinical Services Fund, 520 U.S. 806 (1997) 8

Firestone Tire and Rubber Co. v. Bruch, 489 U.S. 101 (1989) 6, 8

Fixx v. United Mine Workers of America, 645 F.Supp. 352 (S.D.W.Va. 1986) 9

Hewlett-Packard Co. v. Barnes, 425 F.Supp. 1294 (C.D. Cal. 1977) 10

Insurance Bd. Under Social Insurance Plan of Bethlehem Steel Corp. v. Muir, 819 F.2d 408 (3d Cir. 1987) 8

Mitchell Energy & Development Corp. v. Fain, 172 F.Supp.2d 880 (S.D. Tex. 2001) 9

Massachusetts v. Morash, 490 U.S. 107 (1989) 4

New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995) 8

Pegram v. Herdrick, 530 U.S. 211 (2000) 5

Pharmaceutical Care Management Ass'n v. Rowe, 307 F.Supp.2d 164 (D. Me. 2004) 9

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) 2, 9

St. Paul Electrical Workers Welfare Fund v. Markman, 490 F.Supp. 931 (D. Minn. 1980) 9

TABLE OF AUTHORITIES – Continued

Page

Stone & Webster Engineering Corp. v. Ilsley, 690 F.2d 323 (2d Cir. 1982), *aff'd*, 463 U.S. 1220 (1983) 9

Wright Electric, Inc. v. Minnesota State Board of Electricity, 322 F.3d 1025 (8th Cir. 2003) 9

STATUTES

ERISA sec. 3(1), 29 U.S.C. § 1002(1) 3

ERISA sec. 409(a), 29 U.S.C. § 1109(a) 5

ERISA sec. 410(a), 29 U.S.C. § 1110(a) 6

ERISA sec. 502(a)(3), 29 U.S.C. § 1132(a)(3) 4

ERISA sec. 502(e)(1), 29 U.S.C. § 1132(e)(1) 4, 10

OTHER

29 C.F.R. § 2510.3-1(b)(3)(i) 4

3 W. Fratcher, Scott on Trusts § 201 6

3A W. Fratcher, Scott on Trusts § 259 7

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States (the "Chamber") is identified in the preceding Motion for Leave to File Brief Amicus Curiae.[1] Its interest in this matter is also expressed in that motion and thus will not be restated here.

STATEMENT OF THE CASE

This is a case where the fiduciary of an employee benefit plan sought instructions from a federal court on the pre-emption of state law, as he is entitled to do under ERISA for his own protection. But the state authorities subsequently filed a state-court enforcement action and persuaded the Court of Appeals that the fiduciary's pending federal-court action should be dismissed, relying on the Anti-Injunction Act.

The employee benefit plan at issue is a fiduciary's nationwide vacation benefit plan that is designed as an ERISA plan. The State of California alleges that the vacation benefit plan violates the California Labor Code. The fiduciary filed an action in federal district court in South Carolina seeking instruction on ERISA preemption and requesting declaratory and injunctive relief. Three weeks later the State of California filed a complaint against the fiduciary in California state court seeking enforcement of the California Labor Code. The State of California then moved to dismiss the federal court action

[1] Pursuant to Sup. Ct. Rule 37.6, the Chamber represents that neither petitioner nor respondent assisted the Chamber or its counsel, in any way, even with expenses, in preparing or submitting this brief.

contending that, *inter alia*, the Anti-Injunction Act compelled dismissal.

The district court dismissed the case, holding that the court lacked personal jurisdiction. On appeal the Fourth Circuit held that the district court did indeed have jurisdiction, but nonetheless found that the case was otherwise barred by the Anti-Injunction Act. The decision below thus, in practical effect, deprives the fiduciary of his ERISA-protected right to instructions from a federal court on matters of ERISA pre-emption.

ARGUMENT

The Petition Should Be Granted to Preserve, on a Uniform, National Basis, the Critical Right of Fiduciaries under ERISA to Seek Instructions From the Federal Courts on the Pre-Emption of State Laws, as Mandated by Congress in ERISA.

It is beyond dispute that Congress has completely occupied the field of employee benefit plans for federal regulation. The language of the statute's "preemption clause" clearly provides that ERISA "shall supersede any and all State laws in so far as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). This Court acknowledged the power of ERISA's preemption clause in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983), quoting Rep. Dent and then Sen. Williams:

> "Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out

> the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 120 Cong.Rec. 29197 (1974). Senator Williams echoed these sentiments: "It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans. This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law."

It is equally beyond dispute that state legislatures seek to protect their citizens with regard to employee benefits and therefore regularly pass laws that impinge on the federal domain. Some state legislators may be unaware of ERISA pre-emption; others may have a good faith doubt about the extent of ERISA pre-emption in the particular case; and still others may hope that the courts will recognize an exception for their efforts.

The area of vacation benefits is particularly suited to misunderstanding, because the text of ERISA broadly identifies plans that provide vacation benefits as "employee welfare benefit plans" covered by ERISA, while a regulation of the Secretary of Labor exempts most vacation plans from ERISA coverage. That is to say, the text of ERISA flatly defines as "employee welfare benefit plans" any "plan, fund or program" that provides "vacation benefits." ERISA sec. 3(1), 29 U.S.C. § 1002(1). But a regulation administratively exempts all such plans where

the benefits are paid from the general assets of the employer. 29 C.F.R. § 2510.3-1(b)(3)(i).[2]

Just like *Massachusetts v. Morash*, 490 U.S. 107 (1989), this case ultimately involves a dispute over whether an employer's vacation benefit plan is covered by ERISA. The plan clearly satisfies the statutory definition of "employee welfare benefit plan" and just as clearly does not satisfy the regulatory exemption (because benefits are not paid from the general assets of the employer). Yet the State of California insists that the plan is not covered by ERISA.[3]

Whatever the motivation of the state legislators, there is a recurring need for administrators and other fiduciaries of employee benefit plans to clarify the status of their plans under ERISA and establish that particular state laws are pre-empted by ERISA. The mechanism for doing so is an action under section 502(a)(3) of ERISA for appropriate equitable relief to enforce the provisions of ERISA, principally the pre-emption provision in section 514. ERISA sec. 502(a)(3), 29 U.S.C. § 1132(a)(3).[4] Congress decided that such actions should be heard only in federal court. ERISA sec. 502(e)(1), 29 U.S.C. § 1132(e)(1).

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[2] This Court upheld the regulation in *Massachusetts v. Morash*, 490 U.S. 107 (1989).

[3] As this Court noted in *Massachusetts v. Morash*, 48 states have enacted laws regulating vacation pay. 490 U.S. at 109, n.2 (1989).

[4] Section 502(a)(3) of ERISA provides that "A civil action may be brought . . . by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this title or the terms of the plan."

It is important that equitable relief be available to administrators and other fiduciaries of employee benefit plans under ERISA in federal court. The principal reason is that such individuals function as fiduciaries under ERISA. As fiduciaries, they are bound to act in the interest of the participants and beneficiaries of the plan at all times, at the risk of personal liability for any breach of fiduciary responsibility (*see Pegram v. Herdrick*, 530 U.S. 211 (2000)), which means they do not have the luxury of waiting to be sued by state authorities for violations of state law.

Acting in the interest of participants and beneficiaries means, among other things, spontaneously determining the applicability of all laws and obeying them. Unlike an adversary in a commercial context, the fiduciary may not sit back and say, "So sue me." The fiduciary is held to a higher standard: knowing the law and acting accordingly. As this Court has noted with approval:

> Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.

Pegram v. Herdrick, 530 U.S. at 224-5, quoting Justice Cardozo in *Meinhard v. Salmon*, 249 N.Y. 458 (1928).

This unique duty of loyalty is enforced by a unique remedy: personal liability of the fiduciary for any breach. ERISA sec. 409(a), 29 U.S.C. § 1109(a). Congress sought to ensure that the consequences of fiduciary breach would not be visited upon the participants in the plan but would

be borne by the fiduciary personally. So all penalties, damages and liabilities flowing from a violation of law fall on the fiduciary personally, not on the plan, and any provision for the plan to indemnify the fiduciary against such liability is void as against public policy. ERISA sec. 410(a), 29 U.S.C. § 1110(a).

This combination of a higher standard of responsibility and personal liability for any breach was not invented by ERISA but has long been a feature of the common law of trusts, from which the ERISA requirements of fiduciary responsibility were borrowed. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 110-112 (1989). As explained in Scott on Trusts (cited with approval in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. at 112):

> There are situations in which the trustee is liable for breach of trust even though he has not intentionally committed a breach of trust and has not been negligent. . . . The question not infrequently arises whether a trustee is liable for breach of trust where he acted under a mistake of law. It is clear enough that where he fails to perform the duties imposed on him, it is no defense that his failure was due to a mistake of law if he was negligent in making the mistake. . . . Where the trustee makes a mistake of law as to the extent of his duties or powers as trustee, it is no defense that he relied upon the advice of an attorney. . . . It is immaterial whether the mistake is as to statutory or common-law rule of law. . . .

3 W. Fratcher, Scott on Trusts § 201.

In response to the need of fiduciaries to know their duty in advance, without putting their personal assets at risk for a misstep, the common law of trusts accorded

fiduciaries the right to seek instructions from a court of competent jurisdiction. Scott on Trusts explains that the right to seek instructions has always been recognized as the necessary *quid pro quo* for the fiduciary's strict personal liability:

> Ordinarily where a person is in doubt as to his duties, he has no way of determining whether an act would be in violation of his duty except by doing the act and later resisting a claim brought against him for violation of duty. . . . [H]owever, courts of equity in the exercise of their jurisdiction over the administration of trusts have been accustomed to give instructions to trustees at their request as to their duties and powers. A trustee is not compelled to act at his peril in the administration of the trust. He need not act first and discover later whether his act was in breach of trust. He is entitled to the instructions of the court as a protection.

3A W. Fratcher, Scott on Trusts § 259. Specifically as applied to questions of law, Scott on Trusts underlines the importance of the right to seek instructions:

> The mere fact that the trustee makes a mistake of law as to the extent of his duties or powers does not preclude the beneficiaries from holding him liable for breach of trust, if he exceeded his powers or otherwise violated his duties as trustee. Such a rule would impose a hardship on the trustee, were it not that when he is reasonably in doubt as to the extent of his powers and duties he can obtain instructions from the court that will protect him.

Ibid.

The common-law right to seek instructions from a court of competent jurisdiction was preserved under ERISA in the form of an action by a fiduciary under section 502(a)(3) for appropriate equitable relief. That section permits a fiduciary of an employee benefit plan to seek declaratory and injunctive relief regarding the application of state law to the plan which the fiduciary administers, thus removing the need for the fiduciary to act at his peril and, if subsequently determined to be wrong, to suffer personal liability.[5]

Fiduciaries regularly make use of that provision to determine whether state law applies to the plans which they administer, as this Court has seen more than once. *De Buono v. NYSA-ILA Medical and Clinical Services Fund*, 520 U.S. 806 (1997) (fiduciaries sought declaratory judgment that ERISA pre-empted New York State tax on gross receipts of health care facilities), *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (fiduciaries sought declaratory judgment that ERISA pre-empted New York State law imposing surcharges on hospital rates).

Such actions are common in the lower courts. *Insurance Bd. Under Social Insurance Plan of Bethlehem Steel Corp. v. Muir*, 819 F.2d 408 (3d Cir. 1987) (administrator sought declaratory judgment that ERISA pre-empted Pennsylvania law that related to coverage for newborn children, psychological testing service, maternity and services by certain health care providers); *Blue Cross and*

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[5] As this Court noted in *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 112 (1989), in the context of plan interpretation, "A trustee who is in doubt as to the interpretation of the instrument can protect himself by obtaining instructions from the court."

Blue Shield of Alabama v. Hobbs, 209 F.R.D. 218 (M.D. Ala. 2002) (fiduciary sought declaratory judgment that ERISA pre-empted Alabama Physician Assistant Statute); *Mitchell Energy & Development Corp. v. Fain*, 172 F.Supp.2d 880 (S.D. Tex. 2001) (fiduciary sought declaratory judgment that ERISA pre-empted Texas Labor Code as applicable to voluntary separation agreements under ERISA-covered plan); *Fixx v. United Mine Workers of America*, 645 F.Supp. 352 (S.D.W.Va. 1986) (fiduciaries sought declaratory judgment that ERISA pre-empted West Virginia law prohibiting cancellation of benefits while employee is on temporary total disability); *St. Paul Electrical Workers Welfare Fund v. Markman*, 490 F.Supp. 931 (D. Minn. 1980) (fiduciaries sought declaratory judgment that ERISA pre-empted Minnesota Comprehensive Health Insurance Act).

An alternative mechanism serving the same purpose is an action for declaratory judgment, usually by the employer, under the general federal question jurisdiction of 28 U.S.C. § 1331. This Court saw such an action in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983) (state anti-discrimination law), and examples abound in the lower courts. *Wright Electric, Inc. v. Minnesota State Board of Electricity*, 322 F.3d 1025 (8th Cir. 2003) (state law regarding work by unlicensed electricians allegedly in conflict with ERISA regulation of apprenticeship plans); *Children's Hospital v. Whitcomb*, 778 F.2d 239 (5th Cir. 1985) (state law requiring parity in benefits for physical and mental illness); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd*, 463 U.S. 1220 (1983) (state law regarding funding of benefits); *Pharmaceutical Care Management Ass'n v. Rowe*, 307 F.Supp.2d 164 (D. Me. 2004) (state law regulating the processing of

prescription drug claims); *Hewlett-Packard Co. v. Barnes*, 425 F.Supp. 1294 (C.D. Cal. 1977) (California Knox-Keene Health Care Service Plan Act of 1975). Since those actions serve the same purpose as an action by a fiduciary, and since the decision below cuts off those actions just as surely as actions by fiduciaries, the Court may properly view that category of cases as compounding the destructive consequences of the decision below.

Moreover, Congress reserved to the federal courts the function of providing instructions to fiduciaries of ERISA-covered employee benefit plans. While state and federal courts have concurrent jurisdiction of claims for benefits by participants, the federal courts have exclusive jurisdiction of actions by fiduciaries to enforce ERISA. ERISA sec. 502(e)(1), 29 U.S.C. § 1132(e)(1). Since ERISA establishes a uniform, national law of fiduciary responsibility, Congress was understandably intent on assuring a uniform, national application of that law, sidestepping state courts' unfamiliarity with, or even downright hostility to, ERISA.

It is important, therefore, not only that fiduciaries have available a cause of action under ERISA to enforce ERISA but that they have recourse to the federal courts to do so. In the federal courts, fiduciaries find a higher level of experience with ERISA and a freedom from parochial state concerns that might stand in the way of full enforcement of ERISA in accordance with its terms.

The decision below deprives fiduciaries of ERISA-covered plans of this important ability to obtain instructions on their duties under ERISA from a federal court. If allowed to stand, the decision below would teach the state authorities in the affected circuits that, when faced with

an action by a fiduciary in federal court under ERISA to enforce the pre-emption provision of ERISA, all the state authority need do is file an action in state court to enforce the state law and then move for dismissal of the federal action of the fiduciary. Within the Fourth Circuit (or any other circuit that follows the same rule), the fiduciary's federal action will be dismissed and the fiduciary will be reduced to defending a state-court action.

Thus, the decision below gives state authorities within the Fourth Circuit (or any other circuit that follows the same rule) the practical ability to prevent a fiduciary from seeking instructions from a federal court under ERISA. Such a result prevents the fiduciary from receiving an advance determination on the applicability of state law, instead compelling the fiduciary to knuckle under to state law or risk personal liability for any violation. And it deprives the fiduciary of the federal forum that Congress guaranteed him in ERISA.

If fiduciaries are deprived of their opportunity to seek instructions from the federal courts, as is their right under ERISA, the net effect will be the very set of problems that Congress sought to avoid in ERISA by reserving the field of employee benefits plans for exclusive federal regulation –

– pressure on fiduciaries to conform to state law, lest the fiduciary resist, be proved wrong and suffer personal liability, in contrast to the clear intent of Congress to provide federal rules under ERISA;

– a patchwork quilt of regulation varying according to state, instead of the uniform application of federal law that Congress intended; and

– reluctance by fiduciaries to serve, coupled with additional administrative cost for those who do, in contrast to the effort of Congress to reduce cost and simplify administration through a single set of federal guidelines.

CONCLUSION

The ERISA regime of fiduciary responsibility, with its uncompromising standard of loyalty and personal liability for breach, absolutely requires as a *quid pro quo* that the fiduciary have available an effective means of determining in advance whether ERISA pre-empts particular state laws. The decision below deprives the fiduciary of that opportunity, and the conflict among the circuits should be resolved by this Court in a manner that preserves access to the federal courts for fiduciaries as Congress mandated.

Respectfully submitted,

Of Counsel:
STEPHEN A. BOKAT
ROBIN S. CONRAD
ELLEN DUNHAM BRYANT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
(202) 463-5337

HOLLIS T. HURD
Counsel of Record
THE BENEFITS DEPARTMENT
Suite 120
Penn Center West Three
Pittsburgh, PA 15276
(412) 788-2334

Counsel for Amicus Curiae